BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

STEPHEN D. MILLER Claimant VS. **T & T EXTERIOR SIDING, INC.** Respondent AND **MIDWESTERN INDEMNITY COMPANY** Insurance Carrier	)	Docket No. 1,068,498

ORDER

STATEMENT OF THE CASE

Respondent and its insurance carrier (respondent) requested review of the May 13, 2014, preliminary hearing Order entered by Administrative Law Judge (ALJ) Gary K. Jones. Gary K. Albin of Wichita, Kansas, appeared for claimant. Jeffrey D. Slattery of Kansas City, Missouri, appeared for respondent.

The ALJ found the preponderance of the evidence shows claimant's injury arose out of and in the course of his employment with respondent. More specifically, the ALJ found more probably than not a nail gun hit claimant in the head and claimant fell from a ladder. The ALJ explained, "While it is true that no one saw what happened, that does not necessarily mean that it cannot be determined based on the evidence what the most likely cause of the accident was. Circumstantial evidence can be used to determine what happened when no eyewitnesses are available."[1] Additionally, the ALJ granted claimant's request for payment of medical bills.

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the April 22, 2014, Preliminary Hearing and the exhibits; and the transcript of the April 10, 2014, deposition of claimant, together with the pleadings contained in the administrative file.

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[1] ALJ Order (May 13, 2014) at 2.

ISSUES

Respondent argues the ALJ erred and exceeded his jurisdiction in finding claimant sustained an accident arising out of and in the course of his employment. Respondent maintains the cause of claimant's accident and resulting injury is idiopathic; therefore, the ALJ's Order should be reversed.

Claimant contends the ALJ's Order should be affirmed. Claimant argues the ALJ correctly concluded the description of his accident was credible, logical, and establishes it more likely than not arose out of and in the course of his employment.

The sole issue for the Board's review is: Did claimant's accident and resulting injury arise out of and in the course of his employment with respondent?

FINDINGS OF FACT

Claimant was employed by respondent for approximately one year installing siding onto houses. Claimant testified he had performed this line of work for 25 years with various employers. Claimant was paid hourly by respondent.

On January 8, 2014, claimant and two coworkers, Brandon and Derek, were installing siding on a house outside of Wichita, Kansas. Claimant explained:

> I was a cut man and hanger, pretty much – Brandon and I have been doing it for 25 years, both of us, so he would start one side of the house, I would start the other side of the house, and I would side one wall, he would side the other, and then we had a helper that would come back and forth to help us when we got up higher in the air, or longer pieces that we couldn't handle by ourselves.[2]

Claimant stated the pieces of siding are attached to the house by use of a pneumatic nail gun weighing approximately five pounds. Claimant explained he stores the nail gun on his ladder when not in use by laying it sideways on the top rung and draping the air hose over the top of the ladder. Claimant testified:

> It's kind of pinned in between the top of the ladder, the very last step of the ladder and the wall, and 90 percent of the time it stays up there fine, you know, but I have had a lot of times, I mean, I probably couldn't count how many times I've had the nail gun just fall off and land just right next to the house from falling off the ladder, or hit the ladder and kind of hit about two or three steps, and either catch it or just push it away so it doesn't hit me.[3]

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[2] P.H. Trans. at 15.

[3] *Id*. at 27.

The ladder claimant utilized to install siding was approximately 12 feet in length when not extended. Claimant stated he usually props his ladder out from the wall so he may "walk up the ladder, like . . . walking up steps."[4] Claimant testified the foot of the ladder was closer to the house than usual on January 8, 2014, approximately 8 feet from the wall, because the ground was muddy and icy that day. The ladder was not extended.

Claimant stated on January 8, 2014, sometime before noon, he had reached the point where he needed Derek's help installing the siding. Claimant testified he remembered preparing some pieces of siding, setting up Derek's ladder, and placing the nail gun on the top rung of his ladder in preparation of requesting Derek's assistance, as Derek was assisting Brandon on the other side of the house. Claimant stated the next thing he remembers is Brandon and Derek helping him to his feet. Claimant was lying on the ground on his back near the ladder, with his feet closer to the ladder than his head. The nail gun was lying on the ground approximately two feet away from claimant, though he does not recall how it was positioned in relation to his body.

Claimant was told Derek found him unconscious on the ground. Derek notified Brandon, who was still on the other side of the house, and they then notified their boss. There were no eyewitnesses to claimant's accident. Claimant testified:

> [Brandon] told me that he doesn't think that I was up on the ladder very high, probably three or four rungs, which is three or four steps, because my body was closer to the bottom of the ladder, so he thinks that the nail gun fell, I don't know, eight feet, and hit me in the head. That's what he thinks.[5]

Claimant was helped into his boss' truck and taken per his request to his father's house before he was transported to Via Christi Hospital on St. Francis in Wichita, Kansas. Claimant was admitted to the hospital from January 8, 2014, through January 10, 2014. Claimant described his hospital stay as "a big blur."[6]

Hospital records note claimant's final diagnoses:

1. Scapula fracture, nonweightbearing status with sling.
2. Compression fracture of T3, T4, T5, and T12 as well as transverse process fractures of T3 through T11 treatment by thoracolumbar spinal orthosis brace per neurosurgery.
3. Left nodular lung density, recommend follow up in 2 to 3 months.

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[4] *Id*. at 23.

[5] *Id*. at 26.

[6] *Id*. at 31.

4. Alcoholism.[7]

Claimant testified he sustained a black right eye and a bloody nose in addition to his fractures. The hospital records indicated claimant has a history of alcoholism with withdrawal seizures with previous hospitalization. Claimant stated that although he has a history of alcoholism, he has never been diagnosed with epilepsy or received any medical evaluation regarding seizures. Claimant did not recollect any doctor telling him he had a seizure on January 8, 2014. Claimant testified that although he indulged in alcohol and drug use the weekend prior to the accident, he has not had alcohol since January 4, 2014.

Claimant testified he experienced seizures on at least two prior occasions. The first occurred possibly two or three years previously, and the second occurred probably a year after the first. Claimant stated he ingested alcohol the night before both occasions. In August 2013, claimant rode his bicycle home from a bar when he had an accident. A witness called an ambulance and claimant was taken to the hospital. Claimant stated, "I was never told for sure if it was a seizure or not. . . . I was never told for sure what caused the wreck."[8]

Via Christi directed claimant to follow up with Drs. Bradley Dart and James Weimar subsequent to his release on January 10, 2014. No neurosurgical intervention or formal physical therapy was recommended for claimant, and he continued with conservative management, including home exercises. At the time of preliminary hearing, both Drs. Dart and Weimar had released claimant from their care. Claimant was not given formal restrictions, but was instead told to only do what he felt comfortable doing. Claimant testified he does not feel comfortable doing anything because he is still in pain and does not want to worsen his back. Claimant is not currently working.

PRINCIPLES OF LAW

K.S.A. 2013 Supp. 44-501b states:

> (a) It is the intent of the legislature that the workers compensation act shall be liberally construed only for the purpose of bringing employers and employees within the provisions of the act. The provisions of the workers compensation act shall be applied impartially to both employers and employees in cases arising thereunder.
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> (b) If in any employment to which the workers compensation act applies, an employee suffers personal injury by accident, repetitive trauma or occupational disease arising out of and in the course of employment, the employer shall be liable

[7] *Id.*, Resp. Ex. 1 at 1.

[8] P.H. Trans. at 39.

to pay compensation to the employee in accordance with and subject to the provisions of the workers compensation act.

(c) The burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record.

(d) Except as provided in the workers compensation act, no employer, or other employee of such employer, shall be liable for any injury, whether by accident, repetitive trauma, or occupational disease, for which compensation is recoverable under the workers compensation act nor shall an employer be liable to any third party for any injury or death of an employee which was caused under circumstances creating a legal liability against a third party and for which workers compensation is payable by such employer.

K.S.A. 2013 Supp. 44-508 states, in part:

(d) "Accident" means an undesigned, sudden and unexpected traumatic event, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. An accident shall be identifiable by time and place of occurrence, produce at the time symptoms of an injury, and occur during a single work shift. The accident must be the prevailing factor in causing the injury. "Accident" shall in no case be construed to include repetitive trauma in any form.

. . . .

(f)(1) "Personal injury" and "injury" mean any lesion or change in the physical structure of the body, causing damage or harm thereto. Personal injury or injury may occur only by accident, repetitive trauma or occupational disease as those terms are defined.

(2) An injury is compensable only if it arises out of and in the course of employment. An injury is not compensable because work was a triggering or precipitating factor. An injury is not compensable solely because it aggravates, accelerates or exacerbates a preexisting condition or renders a preexisting condition symptomatic.

. . . .

(2)(B) An injury by accident shall be deemed to arise out of employment only if:

(i) There is a causal connection between the conditions under which the work is required to be performed and the resulting accident; and

(ii) the accident is the prevailing factor causing the injury, medical condition, and resulting disability or impairment.

. . . .

(3) (A) The words "arising out of and in the course of employment" as used in the workers compensation act shall not be construed to include:

(i) Injury which occurred as a result of the natural aging process or by the normal activities of day-to-day living;

(ii) accident or injury which arose out of a neutral risk with no particular employment or personal character;

(iii) accident or injury which arose out of a risk personal to the worker; or

(iv) accident or injury which arose either directly or indirectly from idiopathic causes.

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[9] Moreover, this review of a preliminary hearing order has been determined by only one Board Member, as permitted by K.S.A. 2013 Supp. 44-551(l)(2)(A), as opposed to being determined by the entire Board as it is when the appeal is from a final order.[10]

ANALYSIS

The ALJ found this claim compensable based upon circumstantial evidence. The Kansas Supreme Court has written that a "claimant is not required to establish his right to an award by direct evidence alone, or that he produce an eyewitness to the accident; and that *circumstantial evidence* may be used to establish the claim and it is not necessary that such evidence should rise to that degree of certainty as to exclude every reasonable conclusion other than that found by the trial court."[11] The undersigned Board Member agrees a claim can be supported by circumstantial evidence.

Respondent argues this claim is barred by K.S.A. 2013 Supp. 44-508(f)(3)(A)(iv), which specifically excludes accidents or injuries arising "either directly or indirectly from idiopathic causes." Respondent also argues that, based upon the Pythagorean Theorem, it is a physical impossibility for the nail gun to have hit claimant in the head as found by the ALJ.

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[9] K.S.A. 44-534a; see *Quandt v. IBP*, 38 Kan. App. 2d 874, 173 P.3d 1149, *rev. denied* 286 Kan. 1179 (2008); *Butera v. Fluor Daniel Constr. Corp.*, 28 Kan. App. 2d 542, 18 P.3d 278, *rev. denied* 271 Kan. 1035 (2001).

[10] K.S.A. 2013 Supp. 44-555c(j).

[11] *Pence v. Centex Construction Co.*, 189 Kan. 718, 725, 371 P.2d 100 (1962).

The evidence supports a finding claimant suffered a work-related accident when he fell from a ladder. While claimant does not remember falling off the ladder, he suffered compression fractures throughout his thoracic spine. The emergency room record notes state claimant fell a distance of six feet. The evidence creates a reasonable inference claimant fell from some distance onto his back.

In its brief to the Board, respondent outlined the Pythagorean Theorem and proposed relevant equations in support of a finding that the nail gun could not have fallen on claimant. The mathematical opinions of respondent are appreciated. However, for the purpose of making a judicial finding based upon mathematics as a defense, qualified expert testimony is required.

Respondent also suggests claimant experienced a seizure, causing him to fall. K.S.A. 2013 Supp. 44-508(f)(3)(A)(iii) excludes accidents or injuries which arise out of a risk personal to the worker. The undersigned Board Member finds the personal risk exception does not apply. There is no evidence claimant experienced a seizure, causing him to fall from the ladder. As such, the undersigned Board Member cannot find claimant undertook a personal risk by climbing the ladder with a known seizure disorder.[12]

The ALJ found it was more probable than not claimant was hit in the head by a nail gun that had been placed on the top rung of the ladder. The ALJ based his opinion on claimant's testimony that the nail gun falling off the ladder was a common occurrence. Also noted by the ALJ, and in support of this finding, claimant had a black eye and a bloody nose as a result of the accident, which is consistent with claimant's facial injuries. The Via Christi notes confirmed the periorbital ecchymosis (black eye).

Without contradicting medical or expert mathematical evidence, the circumstantial evidence presented is consistent with a finding that, more probably than not, claimant was hit in the face by a heavy object, causing him to fall off the ladder onto his back.

CONCLUSION

The undersigned Board Member finds that, based on the totality of the evidence, it is more probable than not claimant suffered an injury by accident arising out of his employment.

ORDER

WHEREFORE, it is the finding, decision and order of this Board Member that the Order of Administrative Law Judge Gary K. Jones dated May 13, 2014, is affirmed.

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[12] See *Hurtado v. I & A Painting and Remodeling*, No. 1,058,894, 2013 WL 3368487 (Kan. WCAB June 13, 2013).

IT IS SO ORDERED.

Dated this _____ day of July 2014.

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HONORABLE SETH G. VALERIUS
BOARD MEMBER

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Honorable Gary K. Jones, Administrative Law Judge